FARAD CONTINUATION SHEET NO.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

(1) WRIT PETITION NO.796 OF 2006
(2) WRIT PETITION NO.797 OF 2006
(3) WRIT PETITION NO.798 OF 2006

Mr.P.C.Sen & Anr. ..Petitioners
V/s.
The State of Maharashtra ..Respondents

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(4) WRIT PETITION NO.799 OF 2006
(5) WRIT PETITION NO.800 OF 2006

Mr.Vijay Singh & Ors. ..Petitioners
V/s.
The State of Maharashtra ..Respondents

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(6) WRIT PETITION NO.801 OF 2006
(7) WRIT PETITION NO.802 OF 2006

Mr.D.R.S.Chaudhary & Ors. ..Petitioners
V/s.
The State of Maharashtra ..Respondents

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(8) WRIT PETITION NO.2142 OF 2005
(9) WRIT PETITION NO.2143 OF 2005
(10) WRIT PETITION NO.2144 OF 2005
(11) WRIT PETITION NO.2145 OF 2005

Mr.K.V.Chandrashekhar Rao ..Petitioner
V/s.
Mumbai District Central Co-op
Bank Ltd. & Ors. ..Respondents

Mr.Shirish Gupte alongwith Ms. Rekha V.Tawde & Ranjit Shetty i/by PDS Legal for the petitioners.

Ms.Rekha V.Tawade i/by M/s.M.V.Kini & Co. for the petitioners in W.P.2142/2005 to 2145/2005.

Mr.V.A.Thorat Sr.Advocate with A.P.Mundergi with Vaibhav A.Sugdare i/by M/s.Mahimtura & Co. for the respondents in W.P.2142/2005 to 2145/2005.

Mr.V.A.Thorat with A.P.Mundergi for Respondents.

Mr.Rajesh More APP for the State.

Coram : R.S.Mohite,J

Date : 3.5.2006.

P.C.

1. Heard both sides. Rule. By consent, rule made returnable forthwith. Since common questions of law are being argued in all these petitions, the same are being disposed of by this common judgment and order.

2. These petitions seek to quash different criminal cases filed by the Mumbai District Central Co-operative Bank Ltd., against the petitioners and others. It is common ground that petitioners before this Court are all persons who have been nominated as the directors of Madhya Pradesh State Industrial Development Corporation Ltd., either by virtue of their holding an office of employment with the State Government or a financial corporation owned and controlled by the Central Government. it is further common ground that all these nominations have been made prior to 6.2.2003 when the 2nd proviso to Section 141 of Negotiable Instruments Act 1881 was brought in to force.

3. The brief facts which led to the filing of the criminal cases are that an amount of about Rs.111 crores were deposited by the Complainant bank with the Madhya Pradesh State Industrial Development Corporation Ltd., It was to be repaid on maturity. In order to

secure repayments, post dated cheques were given. These cheques were dis-honoured on presentation. The procedure under Section 138 of Negotiable Instruments Act was followed and since payment was not made inspite of demand, criminal complaints alleging offence under Section 138 of Negotiable Instruments Act came to be filed against Madhya Pradesh State Industrial Development Corporation Ltd., and its various directors and officers including the present petitioners.

4. In the complaint, process was issued under Section 138 read with 141 of Negotiable Instruments Act. All the petitioners first filed a group of petitions in this Court but were directed to first approach the Sessions Court in revision. They thereafter filed revisions before the Sessions Court which were all dismissed and that is how this group of petitions were once again filed in this Court.

5. Two points of law were raised and argued in this group of petitions. They can be summarised as under :-

(a) That the complaint did not contain an averment that the petitioners/accused were at the time the offence was committed, in-charge of and responsible for the conduct and business of the Company, as required by the judgment of the Apex Court in **S.M.S.Pharmaceuticals Ltd., V/s. Neeta Bhalla reported in 2005 (8) SCC 89.**

(b) That in any case being nominated directors who were nominated by virtue of their holding an office in the State Government or a financial Corporation owned and controlled by the Central Government, they were covered by the 2nd proviso to Section 141 of Negotiable Instruments Act 1881, which proviso must be held to be retrospective since it was declaratory and procedural in nature.

6. On behalf of the respondents the contention in respect of the aforesaid two propositions can be summarised as under :-

(i) As regards lack of averment, it was contended that there was sufficient and clear averment as required by law.

(ii) That the 2nd proviso to section 141 of Negotiable Instruments Act was not attracted to the facts of this case as the same was neither procedural nor declaratory but created substantive rights by curtailing liability. That the said proviso must be therefore, held to be prospective.

7. I have heard both sides. In my view, both the propositions canvassed on behalf of the petitioners contain no substance and therefore, petitions are liable to be dismissed for the reasons which are mentioned here-in-below.

8. As regards the lack of averment, it would first be necessary to reproduce the averment as contained in the various complaints which admittedly are identical in nature. In Criminal Complaint bearing No.1376/S/2002 the averments are contained in paragraph-1 and 8. The relevant part of the averments pertaining to the accused are in the following terms :-

> " The accused no.1 is a Corporation and accused no.2 is Chairman of accused no.1 and accused nos.3 to 7 are Directors of accused no.1, accused nos.8, 9, & 10 are Dy.General manager (Account) & Dy. General Manager (Administration) respectively and accused no.11 is Dy. Manager. The accused nos.2 to 11 are in charge of affairs and are responsible for conduct and the business of accused no.1 and as such all the accused are liable as more particularly set out hereinafter."
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> Para-8 : "The Complainant states that the accused no.1 is a Corporation and the accused no.2 to 11 are its concerned officers. The said accused no.2 to 11 are incharge of affairs and are responsible for the conduct, business and responsibility liability of the accused no.1 and as such all are responsible for the offence. In the circumstances Complainant states that since the accused have not paid sum of Rs.2.00 crores within 15 days the said

failure is an offence and as such all the accused are liable for action as provided u/s.138 r/w section 141 and 142 of Negotiable Instrument Act."

9. What is sought to be contended is that the averments which are found in the complaints as quoted here-in-above are insufficient as the words "at the time the offence was committed" is not specifically mentioned in the complaints, though such words were required to be averred in view of the ratio of the Apex Court as laid down in paragraph-19 of S.M.S.Pharmacuiticals Ltd., (supra). On perusal of the said judgment however, it is clear that the Supreme Court in its judgment expressly referred to an earlier judgment of the Apex Court in the case of **Monaben Ketanbhai Shah v. State of Gujarat reported in (2004) 7 SCC 15.** In that judgment a two judges bench of the Apex Court in paragraph-4 & 6 observed as under :-

" It is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed and is required to be tried with. It is also true that in construing a complaint a hypertechnical approach should not be adopted so as to quash the same. The laudable

object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparigly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed. All the same, it is also to be remembered that it is the duty of the court to discharge the accused if taking everything stated in the complaint as correct and construing the allegations made therein liberally in favour of the complainant, the ingredients of the offence are altogether lacking. The present case falls in this category as would be evident from the facts noticed hereinafter".

Para-6 : " The criminal liability has been fastened on those who, at the time of the commission of the offence, were in charge of and were responsible to the firm for the conduct of the business of the firm. These may be sleeping partners who are not required to take any part in the business of the firm; they may be ladies and

> others who may not know anything about the business of the firm. The primary responsibility is on the complainant to make necessary averments in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every partner knows about the transaction. The obligation of the appellants to prove that at the time the offence was committed they were not in charge of and were not responsible to the firm for the conduct of the business of the firm, would arise only when first the complainant makes necessary averments in the complaint and establishes that fact. The present case is of total absence of requisite averments in the complaint."

10. On reading of the judgment of the Apex Court in the case of SMS Pharmaceuticals Ltd., (supra) it is clear that the judgment of the Apex Court in the case of Monaben Ketanbhai Shah (supra) was not only followed but cited with approval. The observations in Monaben K.Shah (supra) to the effect that it was not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfil the requirements of Section 141, the complaint has to proceed and is required to be tried, must be taken to have been

approved. In my view the observations in para-19-A of S.M.S.Pharmacuiticals clearly mean that there must be specific averment in the complaint under Section 141 indicating that at the time when the offence was committed, the person accused was in charge of and responsible for the conduct of business of the company. This need not be exactly in the same words but the averment must suggest the existence of the aforesaid requirements which are the essential ingredients of Section 141. For example, if the complaint does not contain the word "at the time when the offence was committed" but instead specifies the exact years between which the accused persons were directors and which period covers the period of commission of the offence and contains averments relating to charge and responsibility then requirement of Section 141 would stand satisfied and crystal inference can be drawn that such an accused at the time of the offence in charge of and responsible for the conduct of business of the company. To my mind, as laid down by the Apex Court in the case of Monaben Shah (supra), any other approach would amount to taking a hypertechnical approach for construing a complaint and would defeat the laudable object of preventing bouncing of cheque and sustaining credibility of commercial transactions which lies behind enactment of Section 141 and 138 of the Negotiable Instruments Act. In the present case as enumerated here-in-above there is a clear averment to the effect that the accused had not paid the sum

demanded by individual notices within 15 days and that such failure was an offence rendering the accused liable for action. This averment clearly amounts to an averment from which it can be clearly inferred that the accused persons including the petitioners were in charge of and responsible to accused no.1 company at the time when the offence was committed.

11. The 2nd point raised on behalf of the petitioners is also devoid of substance. In my view, the 2nd proviso to section 141 of the Negotiable Instruments Act 1881 is a provision which creates substantive rights. It is clearly a provision which creates new rights and liabilities and can only be construed to be prospective in operation. The said 2nd proviso was introduced in section 141 of the Negotiable Instruments Act by Act 55 of 2002 which was brought into effect from 6.2.2003. After the introduction of proviso, section 141 of the Negotiable Instruments Act would read as under :-

> Section 141(1) : "If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly."

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation - For the purposes of this section -

(a) ‘company’ means any body corporate and includes a firm or other association of individuals; and

(b) ‘director’ in relation to a firm, means a partner in the firm.’

. The 2nd proviso in my view, curtails the scope of an offence as created by deeming fiction of law by section 141(1) of the said Act. It not only curtails the substantive rights of the prospective complainant to prosecute nominee directors but also confers substantive rights upon nominee directors covered by the 2nd proviso exempting them from the prosecution for an offence under chapter-XVII, 10 of the N.I.Act 1881. The Advocate on behalf of the petitioners relied upon several judgments of the Apex Court to make good their contentions that the 2nd proviso was merely procedural or declaratory. He first relied upon the judgment of the Apex Court in the case of **Mohanlal Jain V/s. His Highness Maharaja Shri Sawai Man Singhji, Ex-Ruler of Jaipur & Ors. reported in AIR 1962 SC 73.** In that case the question before the Apex Court related to the effect of introduction of Section 87-B on Section 86 of the Code of Civil Procedure. The relevant part of Section 86(1) of the Code of Civil Procedure was in the following terms :-

" No Ruler of a foreign State may be sued in any court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government."

12. Section 87-B which was added to define "Foreign state and Ruler and to make the exemption only available to the State and is held recognised as such by Government. The introduction of Section 87-B thus curtailed the applicability of section 86. The question that arose before the Constitution bench was whether a suit instituted prior to the enactment of section 87-B was liable to be dismissed. The Constitution bench while dealing with this question, in paragraph-12 of the judgment observed as under :-

12. It is next contended that Section 87-B only applies the provisions of sub-sections (1) and (3) of Section 86, that the words of the latter section are not retrospective, that the suit was filed before the enactment of Section 87-B, and that the substantive right of the plaintiff to continue his suit could not be taken away in the absence of express language or clear intendment. The words of Section 86(1) are " No Ruler of a foreign State may be sued in any Court....." This precludes, it is said, only the initiation of a

suit and not the continuance of a suit already filed before the section was enacted. In our opinion, these arguments cannot be accepted. The word "sued" means not only the filing of a suit or a civil proceeding but also their pursuit through Courts. A person is sued not only when the plaint is filed, but is sued also when the suit remains pending against him. The word "sued" covers the entire proceeding in an action, and the person proceeded against is sued throughout the duration of the action. It follows that consent is necessary not only for the filing of the suit against the ex-Ruler but also for its continuation from the time consent is required. In view of the amplitude of the word "sued", it is not necessary to consider generally to what extent pending cases are affected by subsequent legislation or refer to the principles laid down in United Provinces v. Atiqa Begum a, Venugopala Reddiar v. Krishnaswamy Reddiar 2 or Garikapatti Veeraya v. N.subbiah Choudhury 3. If the language of Section 86 read with Section 87-B were applicable only to the initiation of a civil suit, these cases might have been helpful; but since the words "may sue" include not only the initiation of a suit but its continuation also, it is manifest that neither the suit could be filed nor maintained except with the consent of the Central Government. In atiqa Begum case1 Varadachariar,J, referred to the two

principles applicable to cases where the question of retrospectivity of a law has to be considered. They are that vested rights should not be presumed to be affected, and that the rights of the parties to an action should ordinarily be determined in accordance with the law, as it stood at the date of the commencement of the action. But, the learned Judge pointed out that the language of the enactment might be sufficient to rebut the first, and cited the case of the Privy Council in K.C.Mukherjee v.Mst.Ram Ratan Kuer 4. Here, the matter can be resolved on the language of the enactment. The language employed is of sufficient width and certainty to include even pending actions, and the contrary Rule applies, namely, that unless pending actions are saved from the operation of the new law, they must be taken to be affected. The word "sued", as we have shown, denotes not only the start but also the continuation of a civil action, and the prohibition, therefore, affects not only a suit instituted after the enactment of Section 87-B but one which, though instituted before its enactment, is pending. In our judgment, the present suit was incompetent against the first defendant, the ex-Ruler of Jaipur".

13. In my view the facts situation and language of the

statute of the present case are completely different. In the case before the Constitution bench the words in Section 86 of the Code of Civil Procedure provided that No Ruler of the foreign State may be sued (emphasis provided). In the present case the words of the 2nd proviso provide that nominated directors shall not be liable for prosecution under this chapter. Firstly, filing of a suit is an action in personam whereas the launching of a prosecution is an action in rem and the two cannot be equated. Further the wording "may not be sued" does not have the same connotation as "shall not be liable for prosecution". The later words extinguish the very liability for facing the prosecution and in that sense creats a substantial right in favour of the persons who are covered under the 2nd proviso to Section 147 of the Negotiable Instruments Act. Reliance was also placed upon the judgment of the Apex Court in the case of **Gurbachan Singh v. Satpal Singh & ors. reported in (1990) 1 Supreme Court Cases 445**. In the said judgment the Apex Court was seized with the question as to whether section 113-A of the Indian Evidence Act, which related to a presumption of abetment of the suicide was retrospective, concluded that it was indeed retrospective because it was procedural provision in nature. The nature of the enactment before the Apex Court in that case was completely different. The section of the Evidence Act which lays down a presumption obviously affects the procedure in so far as the party in whose favour the

presumption is raised need not go through the procedure of proving certain matters in the trial. In my view, the ratio of the said case does not help the petitioners in the present case. The 3rd judgment cited by the petitioners was in the case of **Punjab Traders & Ors. v. State of Punjab & ors. reported in (1991) 1 SCC 86.** In that case the question was whether an Amendment Act of 1973 was retrospective. The Apex Court held that the principal Act i.e. East Punjab Molasses (Control) Amendment Act, 1973 always applied to Khandsari units as it does to any other sugar factory. Amendment was therefore, clarificatory and thus retrospective. In the present case, the 2nd proviso does not declare or clarify an existing proviso but carves out new exception thus curtailing the scope of the offence and affecting substantial rights of the complainant to launch any prosecution against them. The law laying down the principles with regard to the scope of the Amendment Act and its retrospective operation has been laid down by the Apex Court in several judgments. Useful reference can be made to the judgment of the Apex Court in the case of **Hitendra Vishnu Thakur v. State of Maharashtra reported in AIR 1994 SC 2623** which has culled out the principles with regard to the ambit and scope of an amending Act and its retrospective operation as follows :-

(i) A statute which affects substantive rights is presumed to be prospective in operation unless

made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given unextended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

. More recently the Apex Court has approved and followed this judgment in the case of **Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar reported in AIR 1999 SC 3609**.

14. In my view the 2nd proviso to section 141 of the Negotiable Instruments Act would be a statute which creats new rights & liabilities and is required to be construed as prospective in nature. Once having held so, the 2nd contention of the petitioners must fail.

15. On behalf of some of the petitioners it was sought to be argued that they have resigned earlier to the cause of action. This is however, a question of fact and can only be established by evidence.

16. In the net result, the petitions must fail. However before parting with the order, I may state that all the petitioners before the Court are either very senior officers of the State government or senior officers of the financial institution IDBI. Counsel appearing on their behalf states that the trial can proceed in their absence and that the plea also be recorded through their Advocates. In the circumstances, general exemption is granted to all the petitioners and the trial may proceed upto the stage of 313 statement in their absence. Assurance was given to this Court that no attempt would be made to delay the trial by the concerned Advocates who will co-operate

with the Court. In the circumstances, though the petitions are dismissed, exemption is granted in the aforesaid terms. Rule is made absolute in the aforesaid terms.

17. In view of this order, non bailable warrant issued against the petitioners will stand cancelled. It is made clear that not-with-standing the general exemption, if for any particular purpose presence of the petitioners are required, it will still be open for the trial Court to ask the Advocate for the petitioners to keep their clients present at the trial.

(R.S.Mohite,J)